Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

TERRY LYNN KING,

Petitioner,

v.

MICHAEL DUTTON, Warden, River Bend Maximum Security Institution,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, BY HOLDING THAT A PLEA IS VOLUNTARY AND INTELLIGENT DESPITE THE FACT THAT THE ACCUSED IS NOT INFORMED THAT A CRITICAL CONSEQUENCE OF HIS PLEA IS THAT IT AUTOMATICALLY RENDERS HIM DEATH-ELIGIBLE IN A SEPARATE PENDING CASE, THE SIXTH CIRCUIT HAS UNDULY RESTRICTED THIS COURT'S MANDATE IN *BOYKIN V. ALABAMA* THAT DUE PROCESS REQUIRES A TRIAL COURT TO TAKE ALL STEPS NECESSARY TO ENSURE THAT THE ACCUSED UNDERSTANDS THE CONSEQUENCES OF THE PLEA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Lynn King respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Sixth Circuit, entered on February 17, 1994, and published at 17 F.3d 151 (6th Cir. 1994).

OPINIONS BELOW

The District Court's Order and Memorandum Opinion denying the petition, dated February 23, 1993, is attached at Appendix (App.) 12a.

The opinion of the Court of Appeals, affirming the district court, is reprinted at App. 2a.

JURISDICTION

The opinion of the Sixth Circuit was entered February 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 5

U.S. Constitution, Amendment 14

These provisions are set forth at App. 17a.

STATEMENT OF THE CASE

A. Factual Background

In August 1983, Terry Lynn King was arrested in Knox County, Tennessee, on a charge unrelated to the instant petition. While in the Knox County Jail, Mr. King gave statements which led to separate murder charges being brought against him in both Knox County, Tennessee, and the adjoining County, Grainger County, Tennessee.

On August 9, 1983, a warrant was issued charging Mr. King with first degree murder in Knox County. A Grainger County first degree murder warrant followed the next day. As of August 1983, Mr. King had been simultaneously charged with two different first degree murders.

Under Tennessee Law, there are only two possible punishments for first degree murder – life or death. A conviction for a violent felony renders a defendant automatically eligible for the death penalty under the version of the Tennessee statute then in effect. Tenn. Code Ann. § 39-2-203(i)(2) (1982).[1]

On November 2, 1993, the General Sessions Court for Knox County held a preliminary hearing and bound Mr. King's case over to the Grand Jury on a charge of first degree murder. Mr. King was indicted in Grainger County two weeks later on November 15, 1993 ("the Grainger County Case").

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[1] Reprinted at App. 18a.

On May 3, 1984, petitioner Terry Lynn King and a codefendant pled guilty to first degree Murder in the Grainger County case. The Knox County first degree murder case was pending in the grand jury.

There was no question that the trial judge knew of the pending Knox County first degree murder case. Nevertheless, at the plea hearing in the Grainger County case, the trial judge failed to inform Mr. King that under Tennessee law, the conviction resulting from his plea could be used to satisfy one of the statutory aggravating factors necessary for the imposition of the death penalty in the Knox County case.

As Mr. King testified at the district court hearing, he would not have entered a guilty plea to the Grainger County case had he known of its effect on the Knox County prosecution.

B. The District Court Findings

After exhausting all state remedies, Mr. King filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Tennessee. The basis of the petition was that Mr. King had not entered his plea voluntarily and intelligently as required by *Boykin v. Alabama* and progeny because he was not informed of the critical consequence of his plea – that it could be used to justify the death penalty in the pending Knox County case.

At the evidentiary hearing, Mr. King and his appointed counsel in the Grainger County case testified that Mr. King had originally been hesitant to enter a guilty plea in

Grainger County. According to Mr. King, his hesitation was caused by the fact that his co-defendant had actually shot the victim while Mr. King was in the car.

The District Court found that indeed Mr. King "lacked any information about the potentially very extreme consequences of his plea."[2] However, the District Court denied relief because it found the use of the conviction to impose the death penalty in the pending Knox County case to be a "collateral" consequence of the plea.

C. The Sixth Circuit Opinion

The Sixth Circuit affirmed the district court's denial of the habeas corpus petition, again holding that the use of the resulting conviction was only a "collateral" consequence. The Sixth Circuit interpreted *Boykin v. Alabama* and its progeny to require only that the defendant understand the "direct" consequences of the plea. It defined "direct consequences" to be only those which are "definite, immediate, and automatic."

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[2] Order at App. 12a.

REASONS FOR GRANTING THE WRIT

BY HOLDING THAT A PLEA IS VOLUNTARY AND INTELLIGENT DESPITE THE FACT THAT THE ACCUSED IS NOT INFORMED THAT A CRITICAL CONSEQUENCE OF HIS PLEA IS THAT IT AUTOMATICALLY RENDERS HIM DEATH-ELIGIBLE IN A SEPARATE PENDING CASE THE SIXTH CIRCUIT HAS UNDULY RESTRICTED THIS COURT'S MANDATE IN *BOYKIN V. ALABAMA* THAT DUE PROCESS REQUIRES A TRIAL COURT TO TAKE *ALL* STEPS NECESSARY TO ENSURE THAT THE ACCUSED UNDERSTANDS THE CONSEQUENCES OF THE PLEA.

I. The Sixth Circuit's Standard Contradicts and Trivializes This Court's Mandate in *Boykin v. Alabama*.

a. Boykin and Progeny – The Constitutional Framework.

This Court made it clear twenty-five years ago that, to be valid, a guilty plea must be made voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). A plea that is not made voluntarily and intelligently violates the due process clause of the Fifth and Fourteenth Amendments.

The Court has clarified that in order for the plea to be voluntary, the defendant must possess knowledge of the "relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

In *Boykin*, this Court was quite clear in its mandate to trial courts:

> What is at stake for an accused facing death or imprisonment demands the *utmost solicitude of which courts are capable* in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes *and of its consequence.*

Id. at 243-44 (emphasis supplied).

Furthermore, the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Boykin v. Alabama*, 395 U.S. 238, 244, n. 5 (1969), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In order for a plea to be voluntary, the court must take *all* steps necessary to ensure that the accused understands what the plea means and understands the *consequences* of the plea. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

The defendant's plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A defendant cannot make such a voluntary and intelligent choice without knowing the drastic consequences which flow from that choice. Any guilty plea which is obtained without such an understanding of its consequences violates due process and is therefore void. *Boykin*, 395 U.S. at 243.

The trial court bears a heavy burden to ensure that the defendant does not waive constitutional rights involuntarily. As early as 1927, this Court warned trial courts against accepting pleas without fully explaining the consequences:

> [A] plea of guilty shall not be accepted unless made voluntarily after proper advice and *with full understanding of the consequences.*

Kercheval v. United States, 274 U.S. 220, 223 (1927) (emphasis supplied).

In *Boykin*, this Court did not restrict the consequences of which the defendant must be advised to some narrow category. Rather, the Court made it clear that trial courts were to use the "utmost solicitude" to ensure the defendant understands the important consequences which flow from the plea.

b. The Sixth Circuit's Departure From the Boykin Standard.

Despite this Court's broad mandate to ensure that the accused understands the legal significance and the consequences of a guilty plea, the Sixth Circuit has given *Boykin* a narrow reading. In this case, the Sixth Circuit held that Mr. King's plea was voluntary despite his ignorance of the consequences because the use of the Grainger plea was not "definite, immediate and automatic."

Thus, the Sixth Circuit held that despite the fact that Mr. King was ignorant of the "potentially very extreme consequences" noted by the district court, it could deny relief based on the fact that King could have been acquitted in Knox County or the jury could have declined to use the conviction as an aggravating factor.[3]

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[3] App. at 8a-10a.

The implication of the holding is that if there is *any* possibility that a potential consequence will not occur, then the result is not "definite, immediate, and automatic" and a defendant's ignorance is irrelevant to the voluntariness of his plea.

Such a holding is unworkable and in fact contradicts the Sixth Circuit's own case law and the case law of other circuits. For example, the Sixth Circuit has held that the defendant must be aware of the maximum possible sentence. *See Hart v. Marion Correctional Institution*, 927 F.2d 256, 259 (6th Cir.), *cert. denied*, 112 S.Ct. 70 (1991). However, the imposition of the maximum sentence certainly cannot be considered to be an automatic or definite result in any case.

There is simply no authority from this Court holding that a defendant need not be made aware of a consequence as extreme as the imposition of the death penalty just because it can be argued that such result *might* not have occurred.

The Sixth Circuit ignored this court's mandate to use the "utmost solicitude" of which courts are capable to ensure that the defendant understands the consequences of a plea. This Court's opinions do not call for the establishment of a strict test which denies all relief if the court can find any possibility that a consequence might not have occurred. The "utmost solicitude" language indicates that the court must examine the circumstances of each individual case.

The Sixth Circuit's approach led it to ignore the following critical factors:

1. First and foremost, it ignored the extreme consequence involved – Death. This court has repeatedly noted that "Death is Different" and requires heightened procedural safeguards. *E.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

2. The consequence was easily foreseeable to the trial court. There are only two possible sentences in a first degree murder case. The trial court was made aware of the pending first degree murder case and could have easily advised the defendant of the legal consequences of his act with no added burden on the court.

3. In this case, the consequence really was immediate and automatic, in that the very existence of a violent felony conviction makes a first degree murder defendant eligible for the death penalty. Tenn. Code Ann. § 39-2-203(i)(2).

The restrictive standard adopted by the Sixth Circuit unnecessarily weakens this Court's mandate in *Boykin*, especially in cases such as this in which ensuring that the accused understands the consequences of the plea adds no burden to the trial court.

II. This Court Should Act to Cure the Confusion In the Implementation of *Boykin v. Alabama* in the Various Circuits.

Most Circuits have adopted a very restrictive interpretation of *Boykin* and the requirements of due process; however, there is serious contradiction among the various restrictive readings.

For example, in *Munich v. United States*, 337 F.2d 356, 361 (9th Cir. 1964), the Ninth Circuit held parole ineligibility is a direct consequence and the defendant must be informed of it. Later, the Sixth Circuit and others declared that parole ineligibility is a "collateral" consequence of which the defendant need not be apprised. *See, e.g., Armstrong v. Engler*, 563 F.2d 796 (6th Cir. 1977).

Nevertheless, the Sixth Circuit later held that misadvise from counsel regarding parole ineligibility could render a plea involuntary. *Sparks v. Sowders*, 852 F.2d 882, 885-86 (6th Cir. 1988). The Sixth Circuit apparently holds that misadvising a defendant is somehow distinguishable from allowing the defendant to remain ignorant.

Additionally, the Ninth Circuit and others have held that a mandatory parole term was a direct consequence. *E.g., United States v. Harris*, 534 F.2d 141 (9th Cir. 1976).

There does not seem to be any thread uniting these cases. The test which distinguishes "direct" from "collateral" consequences has produced confusion in the circuits. This Court's guidance is needed to steer the Circuit Courts back to the *Boykin* standard, which takes into account the severity and the foreseeability of the circumstances by mandating that the trial courts ensure that a plea is voluntary by using the utmost solicitude to ensure that the defendant understands what he or she is about to do and the consequences of that act.

The focus should be on whether the plea is voluntary and intelligent and not on whether a particular consequence can be labelled as a collateral consequence, especially where that "collateral" consequence is death.

The inquiry into whether a waiver is voluntary and intelligent cannot be reduced to an arbitrary formula as the Sixth Circuit has attempted to do. Rather, each case turns on its own facts and circumstances. In *Boykin*, this Court adopted to *Johnson v. Zerbst* standard in the guilty plea context. As this Court announced in 1938:

> The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

III. Conclusion

The Circuit Courts of Appeal have strayed far from this Court's mandate in *Boykin* and *Brady*. In *Brady*, the Court sought to ensure that all guilty pleas were made with knowledge of the "relevant circumstances and likely consequences." 397 U.S. at 748. The Circuit courts, and in particular the Sixth Circuit have developed arbitrary tests and have failed to examine the relevant facts and circumstances in each case.

An examination of the facts of Mr. King's case must lead to the conclusion that he did not enter the plea with an understanding of its very serious consequences. It is not disputed that Mr. King entered his plea while facing a first degree murder charge in an adjoining county. The trial court knew of that charge, yet failed to advise him that his potential plea could be used against him as an aggravating circumstance to justify the imposition of the death penalty in the Knox County case.

This Court's review is necessary to bring some consistency to the confusing and arbitrary approaches taken by the various courts on this issue and to bring their approaches into conformity with this Court's precedent and the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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APPENDIX

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No. 93-5390

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY LYNN KING, Petitioner-Appellant, v. MICHAEL DUTTON, Warden, Respondent-Appellee.	) ON APPEAL) from the) United States) District) Court for the) Eastern) District of) Tennessee

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Decided and filed February 17, 1994

Before: BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

BOGGS, Circuit Judge. Petitioner Terry Lynn King appeals the district court's denial of his petition for a writ of habeas corpus. He claims that his guilty plea was involuntary because he was not informed that the state could use the resulting conviction as an aggravating circumstance in the sentencing for an unrelated but pending

murder charge. We hold that such use is a collateral consequence of the plea, about which King need not be advised in order for his plea to be found voluntary.

I

King and Randall Sexton were arrested in Knox County, Tennessee, in August 1983 for the murder of Diana Kay Smith. On August 8, both men made statements admitting to kidnapping and murdering Todd Lee Millard in Grainger County, Tennessee. On November 2, the Knox County court, after a preliminary hearing, bound King over to the grand jury for the first degree murder of Smith.

On November 15, 1983, the Grainger County grand jury indicted King and Sexton for the first degree murder, aggravated kidnapping, and armed robbery of Millard. Pursuant to an agreement negotiated by his court-appointed lawyer, and in order to avoid a possible death penalty, King pleaded guilty to the first degree murder and aggravated kidnapping of Millard. The State dismissed the armed robbery charge and recommended two concurrent sentences of life imprisonment for the murder and kidnapping, plus a five-year sentence enhancement for the use of a firearm during the commission of a felony. The trial judge accepted King's plea and sentenced him according to the plea agreement.

Before accepting King's plea of guilty, the trial judge advised King of his rights, but did not tell him of the impact his resulting conviction might have on his Knox County case. According to King, his lawyer, too, never advised him what impact his guilty plea would have in

the Knox County case. Both the trial judge and King's lawyer knew that King had been bound over to the Knox County grand jury for the Smith murder. At the time of the plea, King was not represented by counsel in Knox County. King says he would not have pleaded guilty and waived his right to a trial by jury if he had known that the conviction resulting from the guilty plea could be used as an aggravating circumstance that might justify imposition of the death penalty in his trial in Knox County.

King was then indicted, tried, and sentenced to death in Knox County for the Smith murder. At the sentencing hearing for the conviction for the Smith murder, King's Grainger County murder conviction was introduced as evidence in support of one aggravating circumstance in support of the death sentence. The jury found four aggravating circumstances, including that King was a violent felon, any one of which would have supported the imposition of the death penalty. *See* Tenn. Code Ann. § 39-13-204(i);[1] *State v. King*, 718 S.W.2d 241 (Tenn. 1986).[2]

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[1] The provision in effect at the time of King's conviction and sentencing was Tenn. Code Ann. § 39-2-203(i) (1982), which does not differ materially from the current death penalty provision.

[2] The other aggravating circumstances found by the jury were: (1) that the murder was especially heinous, atrocious, or cruel because it involved torture or depravity of the mind; (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing King's lawful arrest; and (3) that the murder was committed while committing or fleeing after committing rape, robbery, larceny, or kidnapping. In support of the "violent felon" aggravating circumstances, in addition to the Grainger County felony convictions, the jury found that King

After unsuccessfully pursuing state post-conviction relief, King filed his petition for a writ of habeas corpus on January 7, 1992, alleging that his guilty plea was involuntary, in violation of the Fifth and Fourteenth Amendments, because it was entered without the required understanding of the consequences of the plea. An evidentiary hearing, at which King and his Grainger County court-appointed lawyer testified, was held on February 10, 1993. On February 23, the district court denied King's petition, finding that the impact of the Grainger County guilty plea was not direct, immediate, or automatic and thus was a collateral consequence not requiring a warning from the Grainger County trial court or constitutionally entitling King to advice regarding the consequences. Because there was no evidence that King had relied upon a factual misrepresentation about the potential impact of his plea on the Knox County charge, the district court found that his plea was voluntary, intelligent, and knowing. Following King's notice of appeal, the district court issued a certificate of probable cause to appeal.

II

To be valid, a guilty plea must be made voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969). The plea must be made with knowledge of the "relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.

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had been convicted of an assault with intent to commit aggravated kidnapping, which had been committed only three days after the killing of *Smith*. *King*, 718 S.W.2d at 247-49.

Ct. 1463, 1469 (1970). The defendant need only be aware of the direct consequences of the plea, however; the trial court is under no constitutional obligation to inform the defendant of all the possible collateral consequences of the plea. *Brown v. Perini*, 718 F.2d 784, 788-89 (6th Cir. 1983). Determining whether a plea was made voluntarily requires an evaluation of all the relevant circumstances surrounding the plea. *Caudill v. Jago*, 747 F.2d 1046, 1050 (6th Cir. 1984); *Brown*, 718 F.2d at 786. The "ultimate question" is if the plea was in fact voluntary and intelligent. *Pitts v. United States*, 763 F.2d 197, 200 (6th Cir. 1985).

A conviction's possible enhancing effect on subsequent sentences has been held to be merely a collateral consequence of a guilty plea, about which a defendant need not be advised, even when there was a pending investigation into the charge upon which the subsequent sentence was based. *See United States v. Brownlie*, 915 F.2d 527, 528 (9th Cir. 1990); *United States v. Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1990). Courts also have held that a defendant need not be advised that a conviction based on a guilty plea can be used in a subsequent prosecution resulting from a pending investigation. *See United States v. Campusano*, 947 F.2d 1, 5 (1st Cir. 1991); *United States v. Jordan*, 870 F.2d 1310, 1317-18 (7th Cir.), *cert. denied*, 493 U.S. 831, 110 S. Ct. 101 (1989). Further, a defendant need not be informed of the details of his parole eligibility, including the possibility of being ineligible for parole. *See Brown*, 718 F.2d at 788; *Armstrong v. Egeler*, 563 F.2d 796, 800 (6th Cir. 1977). *Contrast Sparks v. Sowders*, 852 F.2d 882, 885-86 (6th Cir. 1988) (gross misadvice from counsel regarding parole eligibility may render plea involuntary).

However, for a defendant's plea of guilty to be voluntary, the defendant must be aware of the maximum sentence that could be imposed. *See Hart v. Marion Correctional Institution*, 927 F.2d 256, 259 (6th Cir.), *cert. denied*, 112 S. Ct. 70 (1991).

The cases thus indicate that the impact of King's Grainger County conviction on the Knox County case is only a collateral consequence of his guilty plea, and King's ignorance of the possible consequence does not render his plea involuntary. As in *Brownlie and Edwards*, the fact that the Grainger County conviction could result in enhanced punishment in the pending Knox County case – as it apparently did – does not render the plea involuntary.[3] Nor does the record indicate that King was grossly misadvised as to the consequences of his guilty plea. Also, King was aware of the maximum sentence that could be imposed in the Grainger County case – he pleaded guilty in order to avoid the death penalty. Because only the Grainger County conviction is under review here, any lack of knowledge of the maximum penalty on the Knox County charge in the Knox County proceedings (if such there was) is irrelevant to the case at hand.

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[3] King relies on *United States v. Williams*, 899 F.2d 1526 (6th Cir. 1990), arguing that its requirement that notice be given to a defendant before acceptance of his guilty plea if his punishment may be enhanced *in that case* for prior felony convictions demonstrates that sentence enhancement is a direct result of a plea. However, the result in *Williams* turned on the explicit language of 21 U.S.C. § 851, which by its terms requires that such notice be given in federal narcotics convictions. No such provision applies to King's case, nor is one constitutionally mandated.

King's arguments that a narrow exception should be made for his case are unpersuasive. King argues that the use of the Grainger County conviction as an aggravating circumstance in his Knox County case is a direct result of the plea, requiring that he be informed of such use, because (1) the capital case that the plea affected was already pending and the Grainger County trial judge knew that the state intended to use King's plea as an aggravating circumstance; and (2) "the qualitative difference of death," for which the plea made him eligible, "requires correspondingly greater safeguards to insure the voluntariness" of his plea. King relies on, and the district court and the State agree on the applicability of, *Campusano*, 947 F.2d at 5, which stated that the distinction between a direct and collateral consequence turns on whether the result flowing from the plea is definite, immediate, and automatic. *See also Brownlie*, 915 F.2d at 528 (definite, immediate, and automatic result is direct consequence); *Jordan*, 870 F.2d at 1317 (same); *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984) (same); *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.) (same), *cert. denied*, 414 U.S. 1005, 94 S. Ct. 362 (1973).

As the State noted, and the district court agreed, the notice to seek the death penalty in the Knox County case was not filed until after the Grainger County plea, the Knox County prosecutor had discretion to decide whether to make a plea offer, King had discretion to decide whether to make a plea, King could have been acquitted or convicted of a lesser offense in the Knox County trial (thereby precluding the possibility of the death penalty), the jury could have declined to find an aggravating circumstance based upon the Grainger

County conviction, and the jury could have declined to return a verdict of death. Further, the jury could have found (as it did) other aggravating circumstances, so that any effect of the Grainger County conviction is quite speculative. We agree that the use of the Grainger County conviction as an aggravating circumstance in the Knox County case was thus not a direct, immediate, or automatic result of the guilty plea. The state trial court was under no constitutional obligation to inform King of the possible impact in the Knox County murder case of his conviction based on his guilty plea.

We are not persuaded that the Grainger County trial judge knew of the intended use of the Grainger County conviction in the Knox County case. While the record indicates that the trial judge and counsel discussed the effect of the conviction on King's offender classification, the subject of the death penalty never arose. *J.A.* at 93-97. Even if the trial judge knew, however, precedent does not warrant this court imposing an affirmative duty on state sentencing judges to inform criminal defendants of the possible use of their convictions in pending cases. King stresses the unique factual circumstances of his case, but we are unable to discern, even with the assistance of King's counsel at oral argument, the limits of a rule requiring a sentencing judge to inform a defendant of the collateral effects of a conviction based on a guilty plea, even if limited to cases where the judge knows of other pending cases and the possible use of the conviction in them.

Finally, we recognize the "qualitative difference of death," for which penalty the Grainger County conviction made King eligible. However, we are certain that existing

procedural safeguards have adequately insured that King's plea was voluntary as required by the Fifth and Fourteenth Amendments.

III

For the foregoing reasons, the district court's denial of King's petition is **AFFIRMED**.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

TERRY LYNN KING	)	
	)	
v.	)	FILED:
	)	Feb. 23, 1993
MICHAEL DUTTON, Warden, River Bend Maximum Security Institution	)	NO. CIV-3-92-011

ORDER

Terry Lynn King brings this petition for the federal writ of habeas corpus, 28 U.S.C. § 2254, challenging the constitutionality of his convictions of first degree felony murder and aggravated kidnapping entered in the Criminal Court for Grainger County, Tennessee, on May 3, 1984. As grounds for this relief, he asserts that his guilty plea to those charges was not made voluntarily and intelligently because he was not informed by the trial Court, or anyone else, that one of the consequences of his plea was that it could be used as an "aggravating circumstance" in the sentencing portion of another criminal case then pending in Knox County, Tennessee. This action came before the Court for an evidentiary hearing on Wednesday, February 10, 1993. This order constitutes this Court's findings of fact and conclusions of law.

On May 3, 1984, petitioner King and a co-defendant pleaded guilty to first degree murder and aggravated kidnapping in the Criminal Court for Grainger County, the Honorable Kenneth E. Porter presiding. Judge Porter

and Mr. King's counsel both knew that, at that time, Mr. King had been bound over to the Knox County grand jury on an additional first degree murder charge. Under Tennessee law, a murder conviction can be used as an aggravating circumstance to impose the death penalty in the sentencing portion of another first degree murder trial. Mr. King was facing the death penalty on the Grainger County charges and, upon advice of counsel, entered a guilty plea with an agreement that he would receive two life sentences. There is no question that Mr. King entered this plea in order to escape a possible death penalty. Mr. King was later convicted on the Knox County charge and his Grainger County plea was used as an aggravating circumstance for sentencing in the Knox County murder case. There he was sentenced to death by electrocution and he is currently on death row.

At the hearing before this Court, Mr. King testified that he had been hesitant to enter the guilty plea in the Grainger County case because it was his co-defendant who had actually shot their victim while he was waiting in a car. He claimed he entered his plea, on the advice of his counsel, for the purpose of avoiding the death penalty and that he would never have plead guilty if he had known that this plea would be used to obtain the death penalty against him in Knox County.

The due process clause of the fifth and fourteenth amendments requires that a guilt plea be a truly voluntary and intelligent relinquishment of known rights and privileges. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own

counsel, must stand unless induced by threats . . . or . . . misrepresentation. *Brady v. United States*, 397 U.S. 742, 755 (1970). Determining whether a plea is voluntary requires an examination of the totality of the circumstances surrounding the plea. *Brown v. Perini*, 718 F.2d 784, 786 (6th Cir. 1983). Most decisions about whether or not to set aside a guilty plea because it was not "knowing" have turned upon the "direct consequences" language in *Brady, supra*. In other words, Courts have determined whether the unknown consequences of a plea, raised as a basis for habeas corpus relief, were "direct" or "collateral" consequences.

Cases from the Second and Fifth Circuit Courts of Appeal have held that a guilty plea's possible enhancing effect on subsequent sentences is merely a collateral consequence about which a defendant need not be advised. *See United States v. Persico*, 774 F.2d 30, 33 (2nd Cir. 1985), and *United States v. Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1990). However, neither of these cases involved consequences as extreme as the death penalty.

A defendant's parole eligibility date is typically considered a "collateral" consequence of his plea. *See Brown v. Perini, supra*. However, extreme misinformation about the effect of a plea on the punishment for another existing conviction can be the basis for habeas corpus relief. *See Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979). (In *Strader*, although parole eligibility date was held a collateral consequence of a plea about which a defendant need not be informed, a plea made in reliance upon a serious misrepresentation by trial counsel was, nevertheless, set aside.) In the case before the Court, Mr. King was not the victim of misinformation. However, it appears that he

lacked any information about the potentially very extreme consequences of his plea.

Both sides agree that the distinction between a direct and collateral consequence turns on whether the result is definite, immediate, and automatic. *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988). The petitioner argues that the use of a first degree murder conviction in one case and as an especially aggravating circumstance in another murder case, is definite, immediate and automatic. The State disagrees. It argues that at the time Mr. King entered his plea in Grainger County, the Knox County District Attorney General had not yet filed a notice that he would seek the death penalty in that case. He might have chosen not to do so. Or, the Knox County Attorney General might have offered Mr. King a plea agreement which would result in a sentence less than death. Or, Mr. King might have stood trial and been acquitted or convicted of a lesser offense. Or, the jury might have refused to impose the death penalty.

The Court agrees that the impact of the Grainger County guilty plea on the Knox County case was not direct, immediate or automatic, although it was a possibility. It also agrees that its impact on the Knox County case was a collateral, not a direct consequence of the plea. Moreover, the Court does not believe the trial court had a constitutionally-mandated duty to warn Mr. King about this possible collateral consequence of his plea, or that Mr. King had a constitutional right to this advice. In the absence of any evidence that Mr. King relied upon a factual misrepresentation about the potential impact of his plea on the other charge he was facing, the Court

FINDS that his plea was voluntary, intelligent, and knowing.

Accordingly, this petition for the federal writ of habeas corpus is hereby **DENIED.**

ENTER: _____

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES CONSTITUTION

AMENDMENT 5

Criminal Actions – Provisions concerning – Due Process of law and just compensation clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT 14

Citizenship – Due process of law – Equal protection

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CODE ANNOTATED

SECTION 39-2-203

Sentencing for first-degree murder. –

(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant

is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentencing shall be given in the oral charge and in writing to the jury for its deliberations

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstances or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____	/s/ _____
Jury Foreman	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge

upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore,we, the jury, unanimously find that the punishment shall be death.

/s/ _____	/s/ _____
Jury Foreman	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall

impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was

fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial

determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empaneled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment.